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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 207

ARLENE COATS, a partnership consisting of Sidney Berkenfeld and Benjamin Prepon,
Petitioner

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY BRIEF

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1. THE COURT OF CLAIMS ERRED IN DECIDING THAT PETITIONER'S CLAIM WAS BARRED BY THE STATUTE OF LIMITATIONS, AND ITS DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT.

The Court of Claims was clearly erroneous in deciding that petitioner's claim was barred because not filed within

the six-year period provided by 28 U.S.C. 2501, and there is accordingly occasion for further review by this Court. In so deciding the Court of Claims' decision was in direct conflict with decisions of this Court.

It is submitted that the essence of statutes of limitations is that the time begins to run under them as to causes of action only after the right to prosecute such causes of action to a successful conclusion has accrued in a shape to be effectually enforced.

In *United States v. Wurts*, 1938, 303 U.S. 414, 418:

> "We are of opinion that Congress did not intend the limitations of §610 to run against the Government until the Government's right 'has accrued in a shape to be effectually enforced.' "

In *Borer v. Chapman*, 1887, 119 U.S. 587, 602:

> "It cannot be the statute of limitations will be allowed to commence to run against a right until that right has accrued in a shape to be effectually enforced."

The issue here is not as respondent contends (Opposition Brief, p. 5), whether the Wunderlich Statute, Act of May 11, 1954, c. 199, §1, 68 Stat. 81, 41 U.S.C. 321, extended any limitation period. The issue is only as to whether petitioner's right to prosecute the cause of action to a successful conclusion accrued on December 21, 1949 as respondent contends.

The decisions cited by respondent in support of its contention, Opposition Brief, p. 6, are not in point. *Soriano v. United States*, 1957, 352 U.S. 270, concerned a claim by a Philippine resident that the existence of hostilities in the Philippines tolled the statute of limitations. *McMahon v. United States*, 1951, 342 U.S. 25 concerned a claim by an

injured seaman that the two year limitation of the Suits in Admiralty Act, §5, 41 Stat. 526, 46 U.S.C. §745, was tolled during administrative consideration of his claim. *United States v. Sherwood*, 1941, 312 U.S. 584, concerned a suit by a judgment creditor in a District Court to recover damages from the United States for breach of its contract with the judgment debtor. *Ickes v. Fox*, 1937, 300 U.S. 82, concerned a suit by owners of land within a Federal irrigation project to compel the Secretary of Interior to irrigate their lands. *Price v. United States and Osage Indians*, 1899, 174 U.S. 373, concerned an action to recover the value of oxen driven away by Indians belonging to the Osage Tribe. *Eastern Transp. Co. v. United States*, 1927, 272 U.S. 675, concerned a libel in admiralty by the owner of a barge damaged in collision with a ship owned by the United States and used solely as a merchant vessel due to a channel way not being marked with a buoy or beacon by day or a lighted lantern by night. None of the cases rule on the issue here involved which is the date when petitioner's right to prosecute its cause of action to a successful conclusion accrued.

Respondent contends (Opposition Brief, p. 6) that petitioner's claim accrued on December 21, 1949, when the Secretary of the Army approved the decision of the Armed Services Board of Contract Appeals rendered on petitioner's timely appeal from the contracting officer's decision under the Disputes article, and that on that date petitioner could first have instituted suit. *Ball v. United States*, 1956, 133 Ct. Cl. 841, 137 F. Supp. 740, cert. den., 1956, 352 U.S. 827, cited by respondent (Opposition Brief, p. 6) is not in point. *Ball v. United States, supra*, concerned an action to recover pay lost through alleged illegal reductions in grade where the claimant contended that the statute of limitations was tolled while proceedings were pending in a District Court for injunction relief, issued by the District Court, vacated on appeal, and upon remand, dismissed for lack of prosecu-

tion; the Court of Claims ruling that the claimant's right of action accrued at the time of the demotion when all the events had occurred which fixed the liability of the United States to claimant and entitled claimant to sue thereon. The issue involved here is whether when the Secretary's decision was rendered December 21, 1949, and communicated to petitioner January 5, 1950,[1] such decision was final and conclusive upon petitioner so that petitioner had no right to prosecute an action to a successful conclusion until the Wunderlich Statute, *supra*, was enacted on May 11, 1954. Hence, we submit, *Ball v. United States, supra*, is not in point.

Respondent contends that petitioner could have instituted suit when the decision of the Armed Services Board of Contract Appeals was approved by the Secretary of the Army on December 21, 1949. But petitioner's contract provided that "*If . . . the Contracting Officer and the Contractor fail to agree to revised prices, the failure to agree shall be deemed to be a disagreement as to a question of fact which shall be disposed of in accordance with Articles entitled 'Disputes'*" and the "DISPUTES" article provided: "*. . . all disputes concerning questions of fact which may arise under this contract . . . shall be decided by the Contracting Officer . . . Within 30 days . . . the Contractor may appeal to the Secretary of War, whose decision shall be final and conclusive upon the parties.*" (Petition, pp. 5, 6).

Respondent on May 6, 1939, filed petition to writ of certiorari to the Court of Claims in *The United States of America, petitioner v. John McShain, Inc.*, October Term,

[1] The Secretary's decision not being communicated to petitioner on December 21, 1949, and not being a matter of public record could not be effective until made known to petitioner on January 5, 1950: See *Brooks-Callaway Co. v. United States*, 1943, 97 Ct. Cl. 689, 702-706, decision of March 1, 1943, after remand by this Court in *United States v. Brooks-Callaway Co.*, 1943, 318 U.S. 120; *Austin Engineering Co., Inc. v. United States*, 1942, 97 Ct. Cl. 68, 80.

1938, No. 940 (Continued to October Term, 1939, No. 43) and contended therein (p. 6):

> "The Court of Claims in this case has substituted its judgment, on a question as to the proper interpretation of plans and specifications, for the judgment of the contracting officer and the Secretary of the Treasury, to whom the final decision of questions had been committed by specific provisions of the contract and specifications. In failing to give effect to these provisions, the decision is in conflict with the applicable decisions of this Court. *Kihlberg* v. *United States*, 97 U.S. 398, 402; *Martinsburg & Potomac R.R. Co.* v. *March*, 114 U.S. 549, 553-554; *Plumley* v. *United States*, 226 U.S. 545, 547; *Merrill-Ruckgaber Co.* v. *United States*, 241 U.S. 387, 393."

This Court in *United States v. McShain*, 1939, 308 U.S. 512, 520, reversed the Court of Claims.

Respondent also on June 3, 1949, filed petition for writ of certiorari to the Court of Claims in *The United States, petitioner v. Jeff W. Moorman and James C. Moorman, co-partners, Doing Business as J. W. Moorman & Son*, October Term, 1948, No. 837 (Continued to October Term, 1949, No. 97), and contended therein (pp. 8, 9):

> "The dispute arose in the instant case because the contractor considered work demanded of him to be outside the requirements of the contract. Paragraph 2-16 of the specifications, which are expressly incorporated in the contract by Article I (R. 1-2), provides that 'If the contractor considers any work demanded of him to be outside the requirements of the contract' he shall protest to the contracting officer. If not satisfied with the decision of the contracting officer, the contractor may

appeal to the Secretary of War 'whose decision or that of his duly authorized representative shall be final and binding upon the parties to the contract.' *Supra*, p. 3.. In making its own determination of the work required by the contract plans and specifications, the Court of Claims has substituted its judgment for that of the Secretary of War to whom the final decision of this precise question had been specifically committed by the unambiguous provisions of the specifications.

"In failing to give effect to these contract provisions, the decision presents a square conflict with the applicable decisions of this Court. *United States* v. *McShain, Inc.*, 308 U.S. 512, 520; *Merrill-Ruckgaber Co.* v. *United States*, 241 U.S. 387, 393; *Plumley* v. *United States*, 226 U.S. 545, 547; *Martinsburg & Potomac R.R. Co.* v. *March*, 114 U.S. 549, 553-554; *Kihlberg* v. *United States*, 97 U.S. 398, 402."

This Court on October 10, 1949, granted certiorari: *United States v. Moorman*, 1949, 338 U.S. 810; and on January 9, 1950, reversed the Court of Claims: *United States v. Moorman*, 1950, 338 U.S. 457.

Respondent also on February 28, 1951, filed petition for writ of certiorari to the Court of Claims in *The United States, petitioner v. Martin Wunderlich, Ann W. Wunderlich, Marie Wunderlich, E. Murielle Wunderlich, and Theodore Wunderlich, a partnership, trading under the name of Martin Wunderlich Company*, October Term, 1950, No. 584 (Continued to October Term, 1951, No. 11) and contended therein (pp. 13, 14):

"In so far as the court's characterization of the administrative determination as 'arbitrary and capricious' and 'grossly erroneous' means that such determination may be set aside even if it concerns questions

> of fact, the holding is, we submit, a plain misapplication of the settled rule that decisions under Article 15, 'in the absence of fraud or of mistake so gross as to necessarily imply bad faith, . . . will not be subjected to the revisory power of the courts.' *United States* v. *Gleason*, 175 U.S. 588, 602; *United States* v. *Moorman* 338 U.S. 457, 460, 462."

This Court on May 7, 1951, granted certiorari, *United States v. Wunderlich*, 1951, 341 U.S. 924, and on November 26, 1951, reversed the Court of Claims: *United States v. Wunderlich*, 1951, 342 U.S. 98, saying, p. 100: "*So fraud is in essence the exception. By fraud we mean conscious wrongdoing, an intention to cheat or be dishonest. The decision of the department head, absent fraudulent conduct, must stand under the plain meaning of the contract.*" Petitioner before the Court of Claims averred in its petition (Tr. pp. 1-4) that there was no fraud but that the administrative decision was "*arbitrary and capricious and not supported by substantial evidence.*"

Clearly respondent cannot urge upon this Court that petitioner's right to prosecute its claim to a successful conclusion accrued in a shape to be effectually enforced when the decision of the Armed Services Board of Contract Appeals was approved by the Secretary of the Army on December 21, 1949. Respondent in *United States v. McShain*, supra; and *United States v. Wunderlich*, supra, urged upon this Court that under contract provisions similar to those present here (Petition, pp. 5, 6) a contractor is bound finally and conclusively by the administrative determination. This Court so decided: *United States v. Wunderlich*, supra; *United States v. Moorman*, supra; *United States v. McShain*, supra.

If the statute of limitations did not begin to run on December 21, 1949 then it does not matter as suggested in

Opposition Brief, p. 6, footnote 2, that petitioner did not institute its action by December 20, 1955. The statute of limitations did not begin to run on December 21, 1949. Petitioner was then finally bound by the administrative determination and had no right to prosecute an action to a successful conclusion.

This action by petitioner on a claim where the administrative determination was made within 6 years prior to the enactment of the Wunderlich Statute, supra, on May 11, 1954, and upon which suit was instituted within 6 years after May 11, 1954, was within the contemplation of the Congress.

In House Report No. 1380, 83d Congress, 2d Session (Congressional Record, p. 3674) the Committee stated:

> "The statute of limitations regarding claims against the United States is jurisdictional and prevents the consideration of a claim which is more than 6 years old. *Claims less than 6 years old, and not heretofore filed in the Courts may, if filed, receive the protection of the proposed legislation.*" [Italics supplied]

Petitioner's claim was less than 6 years old when the Act of May 11, 1954 (Wunderlich Statute), *supra*, was enacted and this action was filed in the Court of Claims within 6 years after the Act of May 11, 1954, *supra*. Hence petitioner's suit when filed is entitled to receive the protection of the "proposed" legislation. It was within the contemplation of the Wunderlich Statute.

Thus in *MacInnis v. United States*, 1932, 75 Ct. Cl. 538, 542, a suit instituted May 5, 1931, to recover the difference in pay of a lieutenant and a lieutenant, junior grade, for the period July 1 to December 20, 1918, by virtue of an assignment on December 20, 1918, from the grade of lieutenant, junior grade, to the provisional grade of lieu-

tenant, was held to be timely since the right of action did not accrue until the enactment of the Act of May 23, 1930, 46 Stat. 375, had validated his provisional appointment.

It is submitted that respondent was erroneous in asserting that the Court of Claims was clearly correct in deciding that petitioner's claim was barred because it was not filed within the 6 year period provided by 28 U.S.C. 2501. Clearly petitioner's action was timely since it was not until the Wunderlich Statute was enacted on May 11, 1954, that petitioner's right to prosecute its cause of action to a successful conclusion had accrued. The decision below is in square conflict with this Court's decisions. Review and reversal, we submit, are required.

2. THIS CASE SQUARELY PRESENTS THE ISSUE OF "*substantial evidence*" UNDER THE WUNDERLICH STATUTE AS TO WHICH THE DECISIONS OF THE COURT OF CLAIMS ARE IN CONFLICT WITH THE DECISIONS OF THE COURTS OF APPEALS AND THE DISTRICT COURTS.

Respondent contends (Opposition Brief, p. 7) that there is not involved in this case the conflict in the lower courts as to whether under the Wunderlich Statute, *supra*, the reviewing court may upset the administrative determination without regard to the evidence adduced before the administrative authority and solely on the basis of de novo evidence presented to the court. Certainly the Court below regarded this issue as pertinent since it said (Appendix, pp. 17, 18):

> "Although the Wunderlich decision took away plaintiff's remedy of seeking review of the Army's decision on the ground that it was arbitrary and capricious, this

remedy was restored by the Act of May 11, 1954, (68 Stat. 81). That Act did nothing more than this, that is, to restore this remedy. *Volentine and Littleton, Contractors* v. *United States, supra.*

* * *

"It is clear that Congress did not intend to create any new right of action by the Act of May 11, 1954. In *Volentine and Littleton, Contractors* v. *United States*, supra, we held it merely intended to restore the status quo ante the Wunderlich decision."

This ruling was necessary to the decision of the Court below. Had the Court below acknowledged that the Act of May 11, 1954, Wunderlich Statute, *supra*, created a new standard of review, a new right of action in "substantial evidence", it would not have dismissed petitioner's action, since clearly a right of action based upon the new standard of review, "substantial evidence", could not have arisen until May 11, 1954, when the Wunderlich Statute, *supra*, was enacted, and petitioner's suit filed April 11, 1960, was timely.

The Committee on the Judiciary, House Report No. 1380, 83d Cong., 2d Sess., *supra*, said:

"The committee foresees no possibility of the proposed legislation creating any new rights that a contractor may not have had prior to its enactment, *with the exception of the standards of review* therein prescribed." [Italics supplied]

It is the standard of review of "*substantial evidence*" which created the new right that the petitioner sought to enforce below.

It is on this precise point that the decisions of the Court of Claims are in direct conflict with the decisions of the Courts of Appeals and the District Courts cited on page

8 of the petition. The Courts of Appeals and the District Courts assert that Congress by use of the phrase "*substantial evidence*" clearly intended to limit the reviewing Court to the evidence adduced before the administrative authority, whereas the rule in the Court of Claims is as the Court of Claims stated in *Fehlhaber Corporation v. United States*, 1957, 138 Ct. Cl. 571, 577, 151 F. Supp. 817, 821:

> "The only thing we must decide now is whether the decision of the Corps of Engineers Claims and Appeals Board, approved by the Chief of Engineers, is supported by substantial evidence adduced at the trial *de novo* before this court notwithstanding the administrative record."

and in *Carlo Bianchi and Company, Inc. v. United States*, 1959, 144 Ct. Cl. 500, 506, 169 F. Supp. 514, 517:

> "In our opinion in *Volentine and Littleton* v. *United States*, 136 C. Cls. 638, holding that the trial in this court should not be limited to the record made before the contracting agency, but should be *de novo*, we recognized that there were logical weaknesses in our position. We concluded, however, that the intent of Congress in enacting the Wunderlich Act was in accord with our conclusion, and we adhere to that conclusion in this case."

Respondent filed petition for writ of certiorari to the United States Court of Claims in *The United States, Petitioner v. Fehlhaber Corporation*, October Term, 1957, No. 472, and there contended that the Court of Claims in overturning the administrative decision on the basis of evidence presented to the Court at a de novo hearing was in conflict with the Act of May 11, 1954, Wunderlich Statute, *supra*, and with decisions of other Courts. At that time, 1957, the

decisions of the Courts of Appeals and the District Courts, cited in the petition, page 6, had not been decided. The only decision rendered in the Courts of Appeals and cited by respondent in its petition in *United States v. Fehlhaber, supra*, was *Langoma Lumber Corporation v. United States*, 1956, 232 F.2d 886. In *Langoma Lumber Corporation v. United States*, the District Court at 140 F. Supp. 460, 461, 462, had found that the decision of the Armed Services Board of Contract Appeals was supported by substantial evidence in the record made before the Board but the Court of Appeals in affirming the District Court's decision expressly avoided any decision interpreting the meaning of "substantial evidence" as used in the Wunderlich Statute, *supra*, or in laying down the procedure to be followed in determining the existence of "substantial evidence". The Court of Appeals at 232 F.2d 886, 887 said:

> "Nor do we find in the case any necessity of trying to enunciate precisely whether 'substantial evidence' used as a canon in the review of administrative proceedings has the same meaning in all types of review."

This Court on November 18, 1957, denied certiorari: *United States v. Fehlhaber Corp.*, 1957, 355 U.S. 87. It has been suggested that at the time it was not clear that the Court of Claims granted *de novo* review. In *Eight Years After Wunderlich—Confusion in the Courts*, 28 George Washington Law Review 561, 578:

> "Notwithstanding the fact that the Solicitor General declined to seek a writ of certiorari in the *Volentine and Littleton* and *Carlo Bianchi* cases, although he was strongly urged to do so,[78] it is suggested that grounds which are more procedurally obvious, if no more fundamental, now exist for seeking a Supreme Court clari-

fication. A statement by the Supreme Court of the course to be pursued would force an alignment of judicial thinking."

"*Footnote*":

"The Civil Division, Department of Justice and the Department of the Army (the agency in interest) urged petition for a writ. How much the Solicitor General's refusal to seek a writ was influenced by his unsuccessful petition in Fehlhaber Corp. v. United States, 138 Ct. Cl. 571, 151 F. Supp. 817 (1957), *cert. denied*, 355 U. S. 877 (1957), is subject to speculation. In that case, the Judge Advocate General of the Army maintained upon petition that the Court of Claims' decision, if left to stand, would have 'far-reaching implications upon Government procurement', would subject every ASBCA case to *de novo* review in the Court of Claims, and would permit every contractor to appeal 'merely by alleging there was not substantial evidence' to support the ASBCA decision. The respondent, in his answer, maintained that the Court of Claims did not give de novo review. Perhaps that contention influenced the Supreme Court. Since then, it has not only become obvious that the Court of Claims does—consciously—grant a de novo review, but, in addition, there is the impending split among the circuits and the Court of Claims."

It is submitted that this case presents precisely for review by this Court the issue which the respondent asked the Court to review in *United States v. Fehlhaber Corp.*, supra, and that whereas when *United States v. Fehlhaber Corp.*, supra, was before this Court there was not the conflict between the decisions of the Court of Claims and deci-

sions of the Courts of Appeals and the District Courts, such conflict does now exist.

It is respectfully submitted that this case does present for decision by this Court the issue as to whether the Wunderlich Statute, Act of May 11, 1954, *supra*, in establishing "*substantial evidence*" as a standard of review limits the reviewing Court to a review of the administrative record alone as the Courts of Appeals and the District Courts have decided or permits a completely new trial with introduction of new evidence as the Court of Claims has decided.

It is submitted that this conflict in the decisions requires clarification by this Court and that this case squarely presents the issue for decision by this Court.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

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